MCC Overseas (M) Sdn Bhd v TYL Land & Development Sdn Bhd (Sabah Development Bank Bhd, applicant)

HIGH COURT (KUALA LUMPUR) — POST WINDING-UP NO WA-28PW-255–09 OF 2021
NADZARIN WOK NORDIN JC
29 MARCH 2022

Companies and Corporations — Winding up — Proof of debts — Motion filed by applicant for order that proof of debts be expunged — Whether applicant elected to participate in liquidation — Whether proof of debts were filed by mistake — Whether motion ought to be allowed — Companies (Winding-Up) Rules 1972 r 95

In this notice of motion ('motion'), the applicant had applied to this court pursuant to r 95 of the Companies (Winding-Up) Rules 1972 and/or the inherent jurisdiction of this court for an order, inter alia, that the four proof of debts ('PODs') in the sum of RM35,600,758.57 filed by the applicant with the Malaysian Department of Insolvency be expunged. The respondent was a company whereby its nature of business was 'property developer and building contractor of all kinds and descriptions'. The applicant was the secured creditor for a parcel of land ('the security'), charged by the respondent in consideration of the applicant granting facilities to the respondent. The respondent was ordered to be wound-up and an official receiver ('OR') was appointed to be the liquidator of the respondent pursuant to the winding up order. At the time, there was a proposal from Tristar Union Sdn Bhd ('Tristar's proposal') who was willing to acquire and take over the development project above the security by offering the price of RM24.2m to the applicant. Without realising the existence of the said proposal, the applicant proceeded to file PODs for the amount of RM35,600,758.57 ('the outstanding debts') without demarcating the secured and unsecured portions of the debts claimed. Again, without realising Tristar's proposal, the applicant submitted an outdated valuation report ('the outdated valuation report') to the OR to show that the security was valued at RM13m on an 'assumption basis'. However, based on the Tristar's proposal, the security was actually valued at RM24.2m at that point in time. The OR subsequently accepted the value of the security at RM13m and thereafter ranked the applicant as an ordinary creditor for the balance shortfall of RM22,600,758.57. Around April 2021, the applicant was informed by its receiver and manager, Deloitte Corporate Solutions Sdn Bhd ('Deloitte') that they had recently received a proposal from Kara Power Engineering Sdn Bhd ('Kara Power') where Kara Power was willing to offer the price of RM44,823,072.44 ('current estimated realisable amount') to the applicant to take over and rehabilitate the development project above the security, which

exceeded the applicant's outstanding debts. In view of the current estimated realisable amount, the applicant realised that it could rely exclusively on the security to recover its outstanding debts. Therefore, the applicant had requested the liquidators of the respondent to expunge the PODs, filed pursuant to r 94 of the Companies (Winding-up) Rules 1972. However, the liquidators rejected the applicant's request. The applicant subsequently came to know of Tristar's proposal when the liquidators of the respondent requested/attempted to deal with the security by sending a letter to Deloitte. Upon perusing Tristar's proposal, the applicant realised that its estimated value of the security in the beginning was erroneous/inaccurate, and that the outdated valuation report did not reflect the true current value of the security. The applicant now sought to expunge the PODs. However, the liquidators of the respondent refused to expunge the applicant's PODs. Hence, this motion.

Held, dismissing the motion with costs of RM12,000:

(1) The applicant had elected to participate in the liquidation and had on its own accord segregated the secured and unsecured part of its debts with the respondent as well as notified the OR, as the then liquidator, that it would rank as an ordinary creditor for the unsecured amount of RM22,600,758.57 pursuant to the PODs filed. The applicant intended to come under the liquidation of the respondent. The applicant had by its conscious conduct made an unequivocal admission and intention to submit to and thereby elected to participate in the liquidation process in respect of its unsecured portion of its debts (see paras 34–35).

(2) The applicant had acted in accordance with r 126 of the Companies (Winding-Up) Rules 1972 by reason of the applicant voting at the creditors meeting. The applicant had resisted the appointment of other liquidators proposed by a major unsecured creditor. These acts were further evidence of the applicant actively participating in the liquidation process albeit for its unsecured sum as per the PODs as filed. The applicant's reasons or grounds relied on for the motion herein was an afterthought as the PODs were filed on 17 December 2019 whereas the motion herein was filed on 7 September 2021, ie about 20 months after the admission of the PODs and approximately 19 months after the applicant had voted at the creditors meeting on 12 December 2020. The PODs were validly filed and properly admitted by the OR and hence the applicant was now estopped from alleging that the filing of the same was a mistake as they had at all material times been advised by and had the benefit of lawyers advice with regards the filing of the PODs and the applicant's attendance of the said creditors meeting as well as the filing of its own proposed nominee for liquidator and the opposition of the majority creditor's application for another liquidator (see paras 37–40).

(3) There had been no mistake in the filing of the PODs and such contention by the applicant was found to be not only illogical but also totally implausible. The applicant had elected to abide by s 524(1)(b) of the Companies Act 2016 ie value the property subject to the charge and claim in the winding up as an unsecured creditor for the balance due, and that from the contemporaneous documents, the applicant had been accorded due notice and opportunity to make the said election which the applicant did. There was no valid or legal or otherwise justification for r 95 of the Companies (Winding-Up) Rules 1972 and/or the inherent jurisdiction of the court to be applicable in the motion before the court. The applicant must abide by the consequences of its own election (see paras 43–45).

[Bahasa Malaysia summary

Dalam notis usul ini ('usul'), pemohon telah memohon kepada mahkamah ini menurut k 95 Kaedah-Kaedah (Penggulungan) Syarikat 1972 dan/atau bidang kuasa sedia ada mahkamah ini untuk perintah, antara lain, bahawa empat bukti hutang ('BH') dalam jumlah RM35,600,758.57 yang difailkan oleh pemohon dengan Jabatan Insolvensi Malaysia dihapuskan. Responden adalah sebuah syarikat di mana sifat perniagaannya adalah 'pemaju hartanah dan kontraktor bangunan dari semua jenis dan perihalan'. Pemohon adalah pemiutang bercagar untuk sebidang tanah ('sekuriti'), yang dicagarkan oleh responden sebagai balasan pemohon memberikan kemudahan kepada responden. Responden telah diperintahkan untuk digulung dan pegawai penerima ('PP') telah dilantik untuk menjadi pelikuidasi responden menurut perintah penggulungan. Pada masa itu, terdapat usul daripada Tristar Union Sdn Bhd ('usul Tristar') yang sanggup memperoleh dan mengambil alih projek pembangunan di atas sekuriti dengan menawarkan harga RM24.2 juta kepada pemohon. Tanpa menyedari kewujudan usul tersebut, pemohon terus memfailkan BH untuk jumlah RM35,600,758.57 ('hutang tertunggak') tanpa menandakan bahagian bercagar dan tidak bercagar bagi hutang yang dituntut. Sekali lagi, tanpa menyedari usul Tristar, pemohon menyerahkan laporan penilaian lama ('laporan penilaian lama') kepada PP untuk menunjukkan bahawa sekuriti itu bernilai RM13m atas 'asas andaian'. Walau bagaimanapun, berdasarkan usul Tristar, sekuriti itu sebenarnya bernilai RM24.2 juta pada masa itu. PP kemudiannya menerima nilai sekuriti pada RM13 juta dan selepas itu meletakkan pemohon sebagai pemiutang biasa untuk kekurangan baki RM22,600,758.57. Sekitar April 2021, pemohon telah dimaklumkan oleh penerima dan pengurusnya, Deloitte Corporate Solutions Sdn Bhd ('Deloitte') bahawa mereka baru-baru ini menerima cadangan daripada Kara Power Engineering Sdn Bhd ('Kara Power') di mana Kara Power bersedia menawarkan harga RM44,823,072.44 ('anggaran jumlah boleh direalisasi semasa') kepada pemohon untuk mengambil alih dan memulihkan projek pembangunan di atas sekuriti, yang melebihi hutang tertunggak pemohon. Dengan anggaran amaun boleh direalisasi semasa, pemohon menyedari

bahawa ia boleh bergantung secara eksklusif pada sekuriti untuk mendapatkan semula hutang tertunggaknya. Oleh itu, pemohon telah meminta pelikuidasi responden untuk menghapuskan BH, yang difailkan menurut k 94 Kaedah-Kaedah (Penggulungan) Syarikat 1972. Walau bagaimanapun, pelikuidasi menolak permintaan pemohon. Pemohon kemudiannya mengetahui usul Tristar apabila pelikuidasi responden meminta/cuba berurusan dengan sekuriti dengan menghantar surat kepada Deloitte. Setelah meneliti cadangan Tristar, pemohon menyedari bahawa anggaran nilai sekuritinya pada mulanya adalah salah/tidak tepat, dan laporan penilaian lama itu tidak menggambarkan nilai semasa sekuriti yang sebenar. Pemohon kini berusaha untuk menghapuskan BH. Walau bagaimanapun, pelikuidasi responden enggan menghapuskan BH pemohon. Oleh itu, usul ini.

Diputuskan, menolak usul dengan kos RM12,000:

(1) Pemohon telah memilih untuk mengambil bahagian dalam penggulungan itu dan dengan kerelaan sendiri mengasingkan bahagian hutangnya yang bercagar dan tidak bercagar dengan responden serta memberitahu PP, sebagai pelikuidasi ketika itu, bahawa ia akan bertaraf sebagai pemiutang biasa untuk jumlah tidak bercagar sebanyak RM22,600,758.57 menurut BH yang difailkan. Pemohon berhasrat untuk berada di bawah penggulungan responden. Pemohon telah dengan kelakuan sedarnya membuat pengakuan dan niat yang tidak berbelah bahagi untuk tunduk kepada dan dengan itu memilih untuk mengambil bahagian dalam proses penggulungan berkenaan dengan bahagian hutangnya yang tidak bercagar (lihat perenggan 34–35).

(2) Pemohon telah bertindak mengikut k 126 Kaedah-Kaedah (Penggulungan) Syarikat 1972 oleh sebab pemohon mengundi pada mesyuarat pemiutang. Pemohon telah menolak pelantikan pelikuidasi lain yang dicadangkan oleh pemiutang tidak bercagar utama. Tindakan-tindakan ini adalah bukti lanjut pemohon mengambil bahagian secara aktif dalam proses penggulungan walaupun untuk jumlah tidak bercagar seperti dalam BH seperti yang difailkan. Sebab atau alasan pemohon yang disandarkan untuk usul di sini adalah pemikiran semula kerana BH telah difailkan pada 17 Disember 2019 manakala usul di sini difailkan pada 7 September 2021, iaitu kira-kira 20 bulan selepas penerimaan BH dan kira-kira 19 bulan selepas pemohon telah mengundi pada mesyuarat pemiutang pada 12 Disember 2020. BH telah difailkan secara sah dan diterima dengan sewajarnya oleh PP dan oleh itu pemohon kini dihalang daripada mendakwa bahawa pemfailan yang sama adalah satu kesilapan kerana mereka pada setiap masa yang penting telah dinasihatkan oleh dan mendapat faedah nasihat peguam berkaitan pemfailan BH dan kehadiran pemohon dalam mesyuarat pemiutang tersebut serta pemfailan calon penamanya sendiri yang dicadangkan untuk pelikuidasi dan bantahan permohonan

pemiutang majoriti untuk pelikuidasi lain (lihat perenggan 37–40).

(3) Tiada kesilapan dalam pemfailan BH dan pendapat sedemikian oleh pemohon didapati bukan sahaja tidak logik tetapi juga tidak masuk akal sama sekali. Pemohon telah memilih untuk mematuhi s 524(1)(b) Akta Syarikat 2016 iaitu nilai harta yang tertakluk kepada cagaran dan tuntutan dalam penggulungan sebagai pemiutang tidak bercagar bagi baki yang perlu dibayar, dan bahawa daripada dokumen-dokumen semasa, pemohon telah diberi notis dan peluang yang sewajarnya untuk membuat pilihan tersebut yang dilakukan oleh pemohon. Tiada justifikasi yang sah atau sebaliknya bagi k 95 Kaedah-Kaedah (Penggulungan) Syarikat 1972 dan/atau bidang kuasa sedia ada mahkamah untuk diguna pakai dalam usul di hadapan mahkamah. Pemohon mesti akur dengan akibat pemilihannya sendiri (lihat perenggan 43–45).]

Cases referred to

BSC Elevators Sdn Bhd v Sineo Enterprise Sdn Bhd & Anor [2016] MLJU 1147, HC (folld)

Champtaloup v Thomas [1974] 355 NSW 18; [1976] 2 NSWLF 264, SC (folld)

Malgran Resources Sdn Bhd (in liquidation) (receiver appointed), Re [2021] MLJU 2679, HC (distd)

Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong [2021] 3 MLJ 602, CA (refd)

Weatherburn v Bradley BC810–0255, FC (refd)

Legislation referred to

Bankruptcy Act 1966 [AU] ss 92, 99(1)
Companies (Winding-Up) Rules 1972 rr 95, 126
Companies Act 2016 s 524(1), (1)(b), (3)(b)
Insolvency (England and Wales) Rules 2016 [UK] r 14.15

Aerrene Eng Tiong Mei (with Lee Xiao Yao) (Jal & Lim) for the applicant.
Ganesan Karuppannan (Ganesan & Irmohizam) for the respondent.
Denise Cheong Lin Hwei (Raja, Darryl & Loh) for the petitioner.

Nadzarin Wok Nordin JC:

[1] In the notice of motion dated 7 September 2021 ('motion') at encl 1 herein, the applicant has applied to this court pursuant to r 95 of the Companies (Winding-Up) Rules 1972 and/or the inherent jurisdiction of this court for an order, inter alia, that the four proof of debts ('POD's') in the sum of RM35,600,758.57 filed by the applicant with the Malaysian Department of

Insolvency on 17 December 2019 be expunged.

[2] In support of the motion, the applicant had stated its grounds in brief as follows:

(a) the security has increased in value since its last valuation on 24 April 2019 and the current estimated realisable value is in excess of the total amount of four proofs of debt ('PODs'). The current realisable value of the security is derived from the recent proposal from Kara Power Engineering Sdn Bhd ('Kara Power') where they are willing to take over and rehabilitate the developments project above the security by offering the price of RM44,823,017.44 to applicant;

(b) the previous valuation at RM13m of the security was conducted when the security was in an abandoned condition, however, Kara Power is now willing to take over and rehabilitate the development project above the security and therefore the valuation report dated 24 April 2019 by Messrs CH Williams Talhar & Wong Sdn Bhd is now outdated;

(c) the PODs were filed by mistake because the officer of the applicant who attended to the lodgment of the PODs did not know that the security, at that time, had a higher value of RM24.2m (offered by Tristar Union Sdn Bhd (1160203-W) on 6 August 2019). Even though the officer of the applicant had decided to file PODs against the respondent despite knowing the security had a higher value of RM24.2m, the total outstanding amount which the applicant ought to file should be at least in the sum of RM37,167,766.86, instead of RM35,600,758.57 only. Therefore, the amounts stated in the respective PODs are incorrect. However, due to the current realisable value of the security, instead of amending the amount of PODs, the most appropriate way is to expunge the PODs;

(d) the applicant would suffer a substantial prejudice upon realisation of the security if this honourable court refuses the applications as the applicant has to give up the surplus over RM13m to the liquidators where the applicant may be able to recover more or full outstanding amount of the respondent to applicant based on the current estimated value of the security instead of RM13m only;

(e) the expungement of the PODs would not prejudice the rights of other creditors and the overall liquidation of the respondent as the applicant has never benefited from the filing of PODs or received any dividend apart from having voted at the creditors meeting held on 12 February 2020; and

(f) the liquidators' solicitors, Messrs Ganesan & Irmohizam has expressly rejected the applicant's request to expunge the PODs filed vide their letter dated 7 May 2021. Therefore, the applicant has to exercise its rights

A under r 95 of the Companies (Winding-Up) Rules 1972 to make the present application to this honourable court to expunge the same.

[3] For the record, the petitioner's solicitors had also appeared at the hearing of the motion but they had not filed any affidavit in the matter and had left the matter to be decided at the discretion of this court.

BACKGROUND

[4] The respondent was a company incorporated in Malaysia in year 2012 pursuant to the Companies Act 1965, whereby its nature of business is 'property developer and building contractor of all kinds and descriptions' (see pp 16–22, exh 'EY1', encl 2).

[5] The applicant, at all material times, is the secured creditor for a parcel of land held under Geran 328165 Lot 43929 (formerly held under Geran 313607 Lot 27107 and Geran 313608 Lot 27106) Mukim of Semenyih, District of Ulu Langat, State of Selangor measuring approximately 10416 sqmt together with all buildings, fixture and structures erected thereon or affixed thereto ('the security'), charged by the respondent in consideration of the applicant granted the following facilities to the respondent:

(a) terms loans and bridging loan granted on or about 27 June 2014 amounting to RM28m;

(b) bridging loan granted on or about 28 December 2016 amounting to RM9m;

(c) additional bridging loan granted on or about 4 September 2018 amounting to RM10m; and

(d) credit facilities.

[6] On 3 January 2019, the respondent was ordered to be wound-up by this honourable court and the official receiver ('OR') was appointed to be the liquidator of the respondent pursuant to the winding up order dated 3 January 2019 (see pp 24–26, exh EY2, encl 2).

[7] At the time, there was a proposal dated 28 June 2019 and revised proposal dated 6 August 2019 from Tristar Union Sdn Bhd (1160203-W) ('Tristar's proposal') who was willing to acquire and take over the development project above the security by offering the price of RM24.2m to the applicant (see pp 73–74, exh EY5, encl 2).

[8] Tristar's proposal was not known to the applicant at that point in time. Without realising the existence of the said proposal, the applicant through its

solicitors Messrs Wilson Lim proceeded to file PODs for the amount of RM35,600,758.57 (as at 3 January 2019) without demarcating the secured and unsecured portions of the debts claimed Malaysian Department of Insolvency ('MDI') on 17 December 2019, full particulars of which are as follows:

Proof of Debt	Type of facilities granted to the respondent	Amount of the debts claimed (RM) as at 3 January 2019
1	Term loans and bridging loan granted on or about 27 June 2014 amounting to RM28m	12,104,421.80
2	Bridging loan granted on or about 28 December 2016 amounting to RM9m	9,078,150.56
3	Additional bridging loan granted on or about 4 September 2018 amounting to RM10m	13,466,409.28
4	Credit Facilities	951,776.93
	Total Amount (RM)	35,600,758.57

(The total amount of the debts claimed as at 3 January 2016 (RM35,600,758.57) will be hereinafter referred to as 'outstanding debts as at 3 January 2019'.)

[9] Messrs Wilson Lim has thereafter received an email dated 17 January 2020 from official receiver ('email from OR') requesting the applicant to make an election either to withdraw or to proceed with the PODs that are filed, stating that:

(a) the PODs filed by the applicant is a claim against a secured debt;

(b) the applicant may dispose off the security held without filing a proof of debt with the OR; and

(c) if the applicant wishes to proceed with the PODs that were filed, the security held must be surrendered.

[10] Messrs Wilson Lim has thereafter on 29 January 2020 replied to the said email from OR and clarified that the applicant as a secured creditor is maintaining the PODs filed and the security will not be surrendered. Messrs Wilson Lim further explained that the applicant is exercising its right under s 524(1)(b) of the Companies Act 2016 to value and keep the security whilst proving against the respondent for the shortfall ('reply email').

[11] Again, without realising Tristar's proposal (who was willing to offer the price of RM24.2m for the security), in the reply email, the applicant has again on 29 January 2020 through Messrs Wilson Lim submitted an outdated valuation report dated 24 April 2019, which was prepared nine months ago by Messrs C H Williams Talhar & Wong Sdn Bhd ('outdated valuation report') to the OR to show that the security was valued at RM13m on an 'assumption basis'. However, based on the Tristar's proposal (which was unbeknownst to the applicant at the time), the security was actually valued at RM24.2m at that point in time (see pp 45–71, exh EY4, encl 2).

[12] The OR subsequently accepted the value of the security at RM13m and thereafter ranked the applicant as an ordinary creditor for the balance shortfall of RM22,600,758.57. This is shown in the Laporan Tambahan Mesyuarat Am Pemiutang dan Penyumbang dated 1 July 2020 which was adduced to the court through the *afidavit pembetulan pengawai penerima dan penyelesai* by Ishi Masouri bin Hamzah where the OR expressly stated that the quantum of the applicant's debt admitted for voting purpose is in the sum of RM22,600,758.57.

[13] Therefore, the current position of the applicant can be summarised in the chart as follows:

	Rank of the applicant	Amount (RM)
(a)	Secured creditor	13,000,000
(b)	Ordinary creditor (unsecured sum)	22,600,758.57
	Outstanding debts as at 3 January 2019 (RM)	35,600,758.57

[14] Around April 2021, the applicant was informed by its receiver and manager, Deloitte Corporate Solutions Sdn Bhd ('Deloitte') that they had recently received a proposal from Kara Power Engineering Sdn Bhd ('Kara Power') where Kara Power was willing to offer the price of RM44,823,072.44 ('current estimated realisable amount') to the applicant to take over and rehabilitate the development project above the security. The current estimated realisable amount exceeded the applicant's outstanding debts as at 3 January 2019, ie RM35,600,758.57 (see pp 28–43, exh EY3, encl 2).

[15] In view of the current estimated realisable amount, the applicant realised that it could rely exclusively on the security to recover its outstanding debts as at 3 January 2019. Therefore, the applicant had, through its solicitors' letter dated 20 April 2021 to the liquidators' solicitors, Messrs Ganesan & Irmohizam, requested the liquidators of the respondent to expunge the PODs filed pursuant to r 94 of the Companies (Winding-up) Rules 1972.

However, the liquidators rejected the applicant's request in their letter dated 7 May 2021 (see pp 85–90, exh EY7, encl 2).

[16] Towards the end of June 2021, the applicant came to know of Tristar's proposal when the liquidators of the respondent requested/attempted to deal with the security by sending a letter dated 24 June 2021 to Deloitte. Upon perusing Tristar's proposal, the applicant realised that its estimated value of the security in the beginning (when the PODs were filed on 17 December 2019) was erroneous/inaccurate, and that the outdated valuation report did not reflect the true current value of the security. In any event, Deloitte through its letter dated 25 June 2021 had declined the liquidators' request (see p 23, exh EY10, encl 14).

[17] After consulting with the applicant's solicitors, the applicant further discovered that the amounts stated in the PODs (filed on 17 December 2019) only took into account interest as at 3 January 2019, where in fact the applicant, being a secured creditor, was actually entitled to claim interest up to (at least) 2 July 2019. Therefore, the outstanding amount owed to the applicant as at 2 July 2019 should not be less than RM37,167,766.86 (as particularised below (see pp 76–83, exh EY6, encl 2)):

Proof of Debt	Type of facilities granted to the respondent	Amount of the debts claimed (RM)	Outstanding amount as at 2 July 2019 (RM)
1	Term loans and bridging loan granted on or about 27 June 2014 amounting to RM28m	12,104,421.80	12,586,547.21
2	Bridging loan granted on or about 28 December 2016 amounting to RM9m	9,078,150.56	9,425,882.61
3	Additional bridging loan granted on or about 4 September 2018 amounting to RM10m	13,466,409.28	14,135,815.72
4	Credit facilities	951,776.93	
	Total Amount (RM)	35,600,758.57	37,167,766.86

[18] The applicant now seeks to expunge the PODs which had: (i) debts as at 3 January 2019 as well as the total outstanding set out an undervalued estimate of the security; and (ii) did not take into account the applicant's entitlement to interest up to 2 July 2019. This is because given the current

A estimated realisable value of the security which exceeded the applicant's outstanding amount as at 2 July 2019, the applicant will be able to realise the security and rely solely on its proceeds to recover the total outstanding debts owed by the respondent to the applicant. In so doing, the applicant need not prove against the respondent for any balance shortfall.

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[19] However, the liquidators of the respondent vide their letter dated 7 May 2021 (pp 89–90, exh EY7, encl 2) had refused to expunge the applicant's PODs.

C THE APPLICANT'S CASE

[20] The applicant had submitted, inter alia, that:

(a) it is a secured creditor of the respondent and when filing its POD's for the balance shortfall owed by the respondent inadvertently: (i) undervalued its security due to its reliance on an outdated valuation report; and (ii) excluded the interest it was entitled to claim under s 524(3)(b) of the Companies Act 2016;

D

(b) the true current value of the security far exceeds the initial valuation and now having known of the higher valuation intends to rely solely on its security to recover all the amounts owed by the respondent to the applicant;

E

(c) the court has the power to expunge a POD where a mistake was made in lodging the POD;

F

(d) at all times the applicant held on its security and asserted its position as a secured creditor and never surrendered nor made an election to its security to the respondent;

G

(e) in view of the applicant's decision to rely on its security, the POD's no longer serve any purpose and should be expunged by this court;

(f) the applicant only took part in the unsecured portion of its debt and once it was discovered that the estimated current value of its security was enough to cover the amounts owed by the respondent, the applicant no longer took part in the liquidation process; and

H

(g) the applicant would suffer substantial prejudice if the motion is not allowed as the applicant would be deprived of the full benefit of its security.

I RESPONDENT'S SUBMISSION IN OPPOSITION

[21] The respondent submits amongst others that:

(a) the applicant's reason is an afterthought as the POD's were filed on

17 December 2019 whereas the motion herein was filed on 7 September 2021, ie about 20 months after the admission of the POD's and approximately 19 months after the applicant had voted at the creditors meeting on 12 February 2020;

(b) the liquidator pursuant to r 95 of the Companies (Winding-Up) Rules 1972 can only interfere if there exists a dispute between at least two creditors with regard to an admission of a proof of debt;

(c) the applicant need not have to participate in the liquidation but had elected to do so;

(d) the official receiver's ('OR') decision to admit the POD's at the material time was reasonable and not absurd;

(e) the applicant had resisted the appointment of other liquidators proposed by a major unsecured creditor and the applicant had no reason to appoint a liquidator of its own choice in Post Winding-Up No WA-28PW-9–01 of 2020 ('PW9') when it had already appointed its receivers and managers ('R&M') to take control over all the charged assets and to realise the same for and on behalf of the applicant, thus the applicant had actively participated in the liquidation; and

(f) the POD's were validly filed and properly admitted.

FINDINGS OF THE COURT

[22] I have since examined the respective documentary evidence which have been referred to by the respective learned counsels before this court and herewith are this court's findings.

[23] It is clear that the applicant when filing its POD's had relied on and adduced the valuation report from CH Williams Talhar & Wong dated 21 August 2019 which was commissioned by the applicant themselves wherein was stated that the value of the security was RM13m on an 'Assumption Basis' as seen in exh EY4 of encl 2.

[24] The evidence before this court at exh OWC5 of encl 7, further shows that the applicant had in its email dated 29 January 2020 notified the then liquidator, the official receiver ('OR'), via its email and letter dated 29 January 2020 that the applicant will maintain its POD's and that they will not release the security and that the minimum amount of RM22,600,758.57 pursuant to the POD's filed were thus being claimed thereunder, although the applicant had initially filed its POD's for the initial sum of RM35,600,758.57 and thereafter changed their stance when the applicant received the notice from the OR in exh OWC4 of encl 7 to make an election.

[25] I have also observed that the applicant had voted at the creditors meeting dated 12 February 2020 wherein the applicant through its proxy voted in favour of their own choice of private liquidator namely Datuk Mohd Afrizan and that the applicant had opposed one of the creditors, known as Fajarbaru Builder Sdn Bhd, application to the court to appoint a liquidator of their choice.

[26] From the facts before me, as seen in exh EY3 in encl 2, the applicant through its receivers and managers ('R&M') had recently received a proposal from one Kara Power Engineering Sdn Bhd who was willing to offer the price of RM44,823,072.44 to the applicant to take over and rehabilitate the development project above the security. This court has however noted that the said proposal was not dated. From the entire facts before me, the only unmistakable conclusion this court can arrive at is that the motion herein was filed by the applicant as a result of this proposal from Kara Power Engineering Sdn Bhd.

[27] The relevant legal provision on the matter at hand is s 524(1) of the Companies Act 2016 which provides:

> (1) A secured creditor may:
>
> (a) realise a property subject to a charge, if entitled to do so;
>
> (b) value the property subject to the charge and claim in the winding-up as an unsecured creditor for the balance due, if any; or
>
> (c) surrender the charge to the liquidator for the general benefit of creditors and claim in the winding-up as an unsecured creditor for the whole debt.

[28] It is contended by the respondent that the applicant had clearly elected to abide by s 524(1)(b) of the Companies Act 2016 ie value the property subject to the charge and claim in the winding up as an unsecured creditor for the balance due, whilst the applicant states that the court can expunge the POD's where there has been a mistake made by the creditor and had they been made known of the actual value of the security, the applicant would not have filed their POD's and would have instead relied solely on the sale proceeds from the realisation of the security to recover the outstanding amounts owed.

[29] This court was then referred by the applicant's counsel to the Australian case of *Weatherburn v Bradley* BC810–0255 to support their above proposition wherein in the said case the Federal Court of Australia had held:

> I am satisfied that when the proofs were lodged, a mistake was made by Esanda and that, if the true position had been known to the officers who dealt with the preparation and lodgment of the proofs on its behalf, they would have been in a different form to what they were.

[30] I have since had the opportunity to read *Weatherburn* which concerned the application of the Australian s 99(1) of the Bankruptcy Act 1966 to found its claim for expungement of the proofs wherein that section provides:

> (1) Where a creditor or the bankrupt considers that, by virtue of a decision of the trustee under subsection 102(1), (3) or (4), a proof of debt has been wrongly admitted, he may apply to the court for an order that the proof be expunged or that the amount of the admitted debt be reduced, and the court may make an order accordingly.

[31] The applicant had also tried to support their case with reference to r 14.15 of the Insolvency (England and Wales) Rules 2016 and s 92 of the Australian Bankruptcy Act 1966 which I have also perused.

[32] It must be noted that the motion herein was premised on r 95 of the Companies (Winding-Up) Rules 1972 and/or the inherent jurisdiction of this court wherein r 95 reads:

> The court may also expunge or reduce a proof upon the application of a creditor or contributory if the liquidator declines to interfere in the matter.

[33] I hold that a comparison of the Australian s 99(1) of the Bankruptcy Act 1966 and r 95 of the Companies (Winding-Up) Rules 1972 clearly shows that the wordings differ and that the applicability of the Australian s 99(1) of the Bankruptcy Act 1966 or the other English or Australian provisions cited by the applicant's counsel plays no part in the POD's filed in a winding up proceedings in our jurisdiction and that there are no corresponding provisions in the Companies Act 2016 as that in either the English or Australian provisions cited.

[34] From an objective evaluation of the entire surrounding evidence and facts before this court and in particular the respective evidence mentioned above including but not limited to the valuation report from CH Williams Talhar & Wong dated 21 August 2019 and the applicant's email dated 29 January 2020 to the OR, I hold that the applicant had therefore elected to participate in the liquidation and had on its own accord segregated the secured and unsecured part of its debts with the respondent as well as notified the OR, as the then liquidator, that it would rank as an ordinary creditor for the unsecured amount of RM22,600,758.57 pursuant to the POD's filed.

[35] Thus, the above evidence clearly shows that the applicant intended to come under the liquidation of the respondent. This court thus holds that the applicant has by its conscious conduct made an unequivocal admission and intention to submit to and thereby elected to participate in the liquidation process in respect of its unsecured portion of its debts and I adopt and quote

BSC Elevators Sdn Bhd v Sineo Enterprise Sdn Bhd & Anor [2016] MLJU 1147 where the court therein had ruled:

> Thus to show election on the part of the secured creditor to surrender its right over the security and consequentially stand on equal footing with the other unsecured creditor and compete for the assets of the wound-up company there must be evidence of unequivocal conduct which constitute election to surrender and not mere assertion and allegation. The authorities has illustrated while filing of proof of debt for the full amount of the indebtedness may amount to some evidence of an election, it is not by itself unequivocal conduct. Accordingly the conduct and the facts surrounding it must point to one conclusion, namely, the conducts or words are consistent with an unambiguous and undisputable surrender.

[36] I would also refer to the Australian case of *Champtaloup v Thomas* [1974] 355 NSW 18; [1976] 2 NSWLF 264 with regards the election in such a situation which I humbly adopt and which is as follows:

> First it maybe exercised by a conscious act of election. The party having the right may actually determine on his election and, in so far as communication maybe necessary ... communicate it to the other party, and an election thereby made.
>
> Second, the party may do some act which is of such a nature that, irrespective of his actual intention or determination, the law treats him as having exercised his election. This imputation of an election may occur even though the party doers not subjectively know that he has the right to elector even when ho does not intend to elect.

[37] I also hold that the applicant had acted in accordance with r 126 of the Companies (Winding-Up) Rules 1972 by reason of the applicant voting at the creditors meeting dated 12 February 2020 as mentioned above. The said rule provides:

> For the purposes of voting a secured creditor shall unless he surrenders his security, state in his proof or in a voluntary liquidation in such statement as is hereinafter mentioned the particulars of his security, the date when it was given, and the value at which the assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence.

[38] This court also finds that the applicant had resisted the appointment of other liquidators proposed by a major unsecured creditor, Fajarbaru Builder Sdn Bhd, who had filed an application in Post Winding-Up No WA-28PW-136–03 of 2020 ('PW136') in seeking to appoint its own proposed nominee as the liquidator of the respondent, as well as applied to appoint a liquidator of its own choice in Post Winding-Up No WA-28PW-9–01 of 2020 ('PW 9') when it had already appointed its receivers

and managers ('R&M') to take control over all the charged assets and to realise the same for and on behalf of the applicant. I hold that these acts are further evidence of the applicant actively participating in the liquidation process albeit for its unsecured sum as per the POD's as filed.

[39] I also agree with the respondent's counsel and do find that the applicant's reasons or grounds relied on for the motion herein is an afterthought as the POD's were filed on 17 December 2019 whereas the motion herein was filed on 7 September 2021, ie about 20 months after the admission of the POD's and approximately 19 months after the applicant had voted at the creditors meeting on 12 February 2020.

[40] I further find from the facts before me that the POD's were validly filed and properly admitted by the OR and hence the applicant is now estopped from alleging that the filing of the same was a mistake as they had at all material times been advised by and had the benefit of lawyers advice with regards the filing of the POD's and the applicant's attendance of the said creditors meeting as well as the filing of its own proposed nominee for liquidator and the opposition of the majority creditor's application for another liquidator.

[41] For the record, the applicant's counsel had referred me to a decision of this court in *Re Malgran Resources Sdn Bhd (in liquidation) (receiver appointed)* [2021] MLJU 2679 to support their motion herein. With respect, the facts in *Re Malgran Resources Sdn Bhd* is inapplicable to the case before this court herein as it contained material differences with the case before me today in that there:

(a) the applicant there had never estimated the value of its security in the POD as opposed to the applicant here who had given an estimate value for its security;

(b) the applicant there had not attended any creditors meeting of the respondent which could have placed them on the same position of an unsecured creditor as compared with the facts herein where the applicant did actively participate in the creditors meeting;

(c) by allowing the receiver in that said case to be appointed after the winding up had been ordered, and not objecting to the receiver therein, the liquidator had full knowledge of the receiver's appointment and thus could not make an assumption as to the intention of the applicant therein in filing the said POD;

(d) the act of appointing the receiver in that case is entirely inconsistent with the applicant therein making any election to surrender the security for the benefit of the creditors generally; and

(e) the appointment of the receiver therein by the applicant there tantamounted to acting on the security and is evidence that the applicant did not unequivocally surrender the security.

[42] This court should not usurp the functions of the liquidator or interfere with the conduct or decision of the liquidator in discharging his role and function in company liquidation and for this I refer to a recent Court of Appeal case of *Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong* [2021] 3 MLJ 602 where it was held:

> [30] We did not agree with this finding simply because, in our view it is not for the court to determine how the investigation is to be done or carried out by the liquidator and the relevancy and adequacy of the documents to be considered in his investigation before he makes his finding and decision as otherwise, the court will be seen as usurping the function of the liquidator or interfering with the conduct or decision of the liquidator in discharging his role and function in company liquidation. The matter is within the statutory powers of the liquidator unless he had failed to carry out investigations or his conduct was so unreasonable and absurd that no reasonable person would so act or has acted in bad faith.
>
> [40] The liquidator in discharging his role in the present company liquidation was equipped with the necessary qualification, skill and ethics. We agree with the respondent that the duty of the liquidator was to act impartially and to draw the attention of the court to facts and matter which were material for the court's consideration. This was held in the Federal Court case of *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 where the Federal Court was critical when the trial judge had relied on the liquidator who, seemed to have sided with the respondent where the liquidator had failed to consider the appellant's right, ie her right to share in the company surplus assets. Mohamed Dzaiddin FCJ (as he then was) observed at p 719 that the liquidator should maintain an even and impartial hand between all individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatsoever. We agree with the view that a person who holds the status of liquidator, or any persons or its like, whether or not appointed by court, for reward, has a high standard to meet. The court will interfere with the decision of the liquidator when the circumstances or the facts warrant it such as the present.

[43] Accordingly, this court finds that there has been no mistake in the filing of the POD's and I find such contention by the applicant in the circumstances as being not only illogical but also totally implausible.

[44] I thus hold that the applicant had elected to abide by s 524(1)(b) of the Companies Act 2016 ie value the property subject to the charge and claim in the winding up as an unsecured creditor for the balance due, and that from the contemporaneous documents before this court, the applicant had been accorded due notice and opportunity to make the said election which the applicant did. The applicant cannot be given a 'second bite of the cherry'

having freely and independently made its election.

[45] I therefore cannot agree with the applicant's contention that they had made it clear that they were not forgoing the security and therefore they were entitled to value its security once the security is given its proper value. This court will in the circumstances hold that there is no valid or legal or otherwise justification for r 95 of the Companies (Winding-Up) Rules 1972 and/or the inherent jurisdiction of this court to be applicable in the motion before this court. The applicant must abide by the consequences of its own election.

[46] Wherefore this court hereby dismisses the motion in encl 1 with costs of RM12,000 to be paid by the applicant to the respondent.

Motion dismissed with costs of RM12,000.

Reported by Ahmad Ismail